Supreme Court, U.S.
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No. 97-

In The
Supreme Court of the United States
OCTOBER TERM, 1997

James Kirk, And Marcia Kirk
Donna Sue Gall, And
Patty Hummer, Together With
The Remaining Property Owners
Who Are Signatories Hereto And
Who Are In the Caption Of This Complaint,
Petitioners

v.

The Town Of Osceola, Indiana
Respondent.

On Petition For Writ of Certiorari to the Supreme Court of Indiana

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court denied Petitioners their Constitutional due process rights of fair and adequate notice when it granted Summary Judgment by incorrectly deciding the question of law regarding the triggering "event" for the time period within which the Petitioners' remonstrance must be filed under the Indiana Annexation Ordinance Publication statute.

2. Whether the Trial Court misinterpreted and/or misapplied Indiana Code 5-3-1-2(h)which is the Indiana Annexation Ordinance Publication statute.

3. Is the Trial Court's interpretation of the Indiana Annexation Statute Publication requirement inconsistent with Federal and state constitutional safeguards protecting the individual's due process rights of sufficiency of notice and access to the courts.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below are named in the caption.

Petitioners James Kirk, And Marcia Kirk, Donna Sue Gall, And Patty Hummer, Together With The Remaining Property Owners Who Are Signatories Hereto And Who Are In the Caption Of This Complaint are the appellants in the Indiana Supreme Court and Plaintiffs in the state trial court. Respondent, The Town Of Osceola, Indiana, is the appellee in the Indiana Supreme Court and the defendant in the state trial court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James Kirk, And Marcia Kirk, Donna Sue Gall, And Patty Hummer, Together With The Remaining Property Owners Who Are Signatories Hereto And Who Are In the Caption Of This Complaint, respectfully petition for a writ of certiotari to review the decision of the Indiana Appellate Court with Indiana Supreme Court's denial of transfer, without opinion.

OPINION BELOW

The decision of the Indiana Court of Appeals sought to be reviewed is published as *Kirk v. Town of Osceola*, 669 N.E.2d 1060 (Ind.App.1996) is reproduced in the Appendix beginning at A-1. The Supreme Court of Indiana's denial of Appellants' Petition For Transfer is reproduced in Appendix B .

JURISDICTION

The Indiana Court of Appeals decided the case with a written opinion filed August 26, 1996. Appellants' Petition For Transfer was denied by the Supreme Court of Indiana on February 20, 1997. This Petition For Certiorari is being filed within 90 days of that date. This Court has the jurisdiction to review final judgments of state courts pursuant to 28 U.S.C. § 1257(3)(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution are the Due Process and Fair Notice Clauses of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Relevant Indiana Constitutional provision is *Article I, Section 12 of the Indiana Constitution* which guarantees its citizens access to their court system. Relevant Indiana statutory provisions include I.C. 36-4-3-7; I.C. 36-4-3-11(a) & (c) and I.C. 5-3-1-2 which proscribe the requirements for publication of the Ordinance and timely filing of remonstration. I.C. 5-3-1-2 (h) states:

> "If the event is one about which notice is required to be published after the event, notice shall be published one (l) time within thirty days after the date of the event."

And I.C. 5-3-1-2(i) states:

> "If the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least three (3) days before the event."

The pertinent part of the Ordinance's language in section 4 is as follows (under I.C. 36-4-3-11 (a) & (c):

> "[T]he annexation of the described territory shall be effective sixty (60) days after the last notice published pursuant to I.C. 5-3-1."

STATEMENT OF THE CASE

Material Facts

This case was an appeal of the lower court's granting of defendant's Motion for Summary Judgment which denied Plaintiffs' remonstration petition and complaint. James and Marcia Kirk, and other remaining property owners of unincorporated Osceola, Indiana oppose being annexed into the Town of Osceola, Indiana. They tried to exercise their right of remonstration by filing their REMONSTRANCE PETITION AND COMPLAINT against the Town of Osceola, Indiana after it passed an Annexation Ordinance. They filed their claim within Sixty (60) Days of the last publication of such Annexation Ordinance. The last publication was May 13, 1993.

On May 3, 1993, the Town of Osceola, Indiana passed the Annexation Ordinance which was the subject matter of the Petitioners' Complaint. After the Annexation Ordinance was passed, the local *MISHAWAKA ENTERPRISE* published the Ordinance on May 6, 1993 and on May 13, 1993. The Petitioners believed that they had sixty (60) days after the last publication of the Annexation Ordinance, which occurred on May 13, 1993, to file their REMONSTRANCE PETITION AND COMPLAINT. Accordingly, such cause of action was commenced on July 8, 1993 in the St. Joseph Superior Court, Indiana.

On December 21, 1993, Defendant filed its "Motion For Summary Judgment" with its "Memorandum In Support Of Motion For Summary Judgment". On March 28, 1994, the Petitioners filed their "Memorandum In Opposition To Defendant's Motion For Summary Judgment". On February 21, 1995, the Honorable William T. Means granted Defendant's "Motion For Summary Judgment".

The Praecipe for Record of the Proceedings was timely filed on the 22nd day of March, 1995. The Record of the Proceedings was then timely filed with the Indiana Court of Appeals on June 19, 1995. On October 4, 1995, Petitioners appealed to the Indiana Court of Appeals arguing among other things that they were deprived of their constitutional safeguards protecting the individual against due process violations of Insufficiency Of Notice and constitutional rights of access to their State Court since the Indiana Annexation Statute Publication requirement is unconstitutionally vague as it lends itself to more than one interpretation.

The Indiana Court of Appeals decided the case with a written opinion filed August 26,1996. The written opinion was against Appellants. The Indiana Court of Appeals upheld the Town of Osceola's interpretation of the pertinent Notice Statutes. No petition for rehearing was filed with the Court of Appeals.

The Petitioners filed for Petition For Transfer to the Supreme Court of the State of Indiana by stating that the written opinion of the Court of Appeals was in error for each of the following reasons:

A. The opinion of the Court of Appeals contravenes ruling precedent of the Indiana Supreme Court espousing the issues of fair play and protection of citizens from the powers of an overreaching governmental entity. In its opinion, the Appellate Court ignored the issues of procedural fair play and due process. The Indiana Supreme Court has long upheld that the principles of fundamental fairness and proper notice need to be satisfied in order to empower the small private citizen an opportunity to combat the overpowering governmental entity. Town of Argos v. Ritz Craft Realty, Inc., 238 N.E.2d 14, 250 Ind. 562 (1968). See also McKee v. Town of Pendleton, (1904), 162 Ind. 667, 69 N.E. 997. In McKee, the Court subscribed to the proposition that procedural fair play and due process, especially when dealing with a citizen's constitutional property rights and fair taxation, warrants at least more than one publication notice. In essence, the Appellate Court foreclosed the Appellants-Plaintiffs' fair access to judicial redress by adopting a contrary interpretation of the Annexation and Publication Notice Statutes relied upon by the Appellants-Plaintiffs. The Appellate Court's failing in allowing for a proper interpretation of the Indiana Statutes shocks the conscience of fairness and due process. Such an approach by the Appellate Court contravenes the consummate mandate

of the Indiana Supreme Court that, as stated by Justice J. Dickson: "The openness of Indiana courts is a foundational policy objective expressly recognized in *Article I, Section 12 of the Indiana Constitution.*" Pence v.State of Indiana, No. 49S00-9406-CV-579, Indiana Supreme Court, June 20, 1995 at Page 3. See also Klein v. City of Indianapolis By and Through Its BOARD OF FLOOD CONTROL COMMISSIONERS, 224 N.E.2d 42, 248 Ind. 117 (Ind. 1967).

B. There is a conflict between the written opinion and prior opinions of the Court of Appeals such as found in Plumblee v. Monroe Guaranty Insurance Co., 655 N.E.2d 350, 355 (Ind. App. 1995); Bemis v. State, 652 N.E. 2d 89 (Ind. App. 1995); Wesner v. Metropolitan Development Com'n of Marion County, 609 N.E.2d 1135, 1139 (Ind.App. 1 Dist. 1993); National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management, 571 N.E.2d 548, 555 (Ind.App. 4 Dist. 1991); Citizens Gas and Coke Utility v. Wells, 275 N.E.2d 323, 326, 150 Ind. App. (Ind.App. 1971); and Board of Com'rs of Howard County v. Kokomo City Plan Commission, 310 N.E.2d 877, 892 (Ind.App. 2 Dist. 1974). In those prior opinions of the Court of Appeals has consistently favored reviewing the citizen's basic constitutional rights of fair play and due process along with a willingness to properly review statutory construction to determine whether the actual construction of the statute leads to confusion. The written opinion of the Indiana Court of Appeals in the present case dispenses with those responsibilities of constitutional review for the sake of fundamental fairness and due process and instead bases its opinion of the Court's misinterpretation of

the requisite statute concerning the interpretation of what constitutes the "triggering event", what is meant by "last publication", and the impact of those confusing terms on the citizens' fair understanding of what the law expects of them. Appellants-Petitioners felt that the words "last publication" inferred that more than one publication occurs before the 60-day time allowance begins to run. The consequence is, as stated by the Indiana Court of Appeals, in another opinion, is nothing less than a "manifest perversion of [their] constitutional [rights]." Board of Com'rs of Howard County v.Kokomo City Plan Commission, 310 N.E. 2d 877, 892 (Ind.App. 2 Dist. 1974).

Further, Petitioners felt there was a conflict between the written opinion and prior opinions of the Court of Appeals in Place v. Sagamore Center, Inc., 604 N.E.2d 671, 673 (Ind.App.1 Dist. 1992), *citing T.R.56(H)*. See also Warren v. WLT Corporation, 653 N.E. 2d 1054, 1056 (Ind.App. 1995). In the Place opinion the Appellate Court has determined that for a genuine issue of material fact to exist "...where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." Place v. Sagamore Center, Inc., 604 N.E.2d 671, 673, (Ind.App. 1 Dist. 1992).

This Opinion is also contrary to the well-established rule regarding rendering decisions on Summary Judgment in compliance with these standards that if the Court has any "doubts concerning the existence of a genuine issue of material fact, we must resolve those doubts in favor of the nonmoving party." Place at 673. This Opinion goes against the Appellate Court's own cautionary approach to the significant impact of a Summary Judgment foreclosing the individual's further access to the courts as it undertakes its responsibility with a self-imposed caveat that since it has rendered rulings recognizing that a Summary Judgment is a "lethal weapon" so it must "beware of overkill in its use." Place at 673.

The Supreme Court of the State of Indiana denied Appellants' Petition For Transfer on February 20, 1997 without a written opinion.

REASONS FOR GRANTING THE PETITION

The decision of the Indiana Appellate Court is in conflict with the decisions of other state and Federal appellate courts which guarantee the citizen his consummate constitutional due process rights of fair and proper notice, especially when it involves actions by an overpowering government. In its decision, the Indiana Appellate Court accepted the "governmental" interpretation of the statute without any review of the actual language of the unconstitutionally vague Indiana statutes which lead to the confused and ambiguous interpretation of the number of notice publications required for the citizen remonstration against the governmental annexation process. Appendix "A-2". And, the Supreme Court of Indiana's denial of transfer further leaves critical constitutional issues of statutory interpretation and ambiguity unresolved. The result is the endorsement of an unfair interpretation of a confusing and ambiguous annexation statute allowing for governmental actions without regard to the due process rights of its citizens.
Review by this Court is necessary for the sake of the public interest as the ultimate protector of the citizen from arbitrary conduct by an overpowering government and is necessary in order to stop the creation of vague and ambiguous laws behind which some governmental entities have chosen to hide.

I. The Decision That Sides With The Government's Interpretation Of A Confusing And Ambiguous State Statute Deprives The Citizens Of Their Fundamental Constitutional Rights Of Fair And Proper Notice And Due Process - Especially Involving The Citizens' Fifth And Fourteenth Amendment Property Rights.

There are compelling issues of denial of due process and fair notice which warrant certiorari review. The most basic right guaranteed the United States citizen by the United States Constitution is being "entitled to fair notice in dealing with his government . . . [.]" *Wisconsin Electric Power Co. v. Occupational Safety and Health Review Com'n,* 567 F.2d 735, 741(C.A. 7 1977). The Federal Court has declared governmental ordinances and statutes "void for vagueness" because "[a]s a matter of due process, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of . . . statutes. . . .' " *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (C.A. 7 (Ill.) 1990), *citing Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (citations omitted).

The above-stated issues of Federal Constitutionality attach to the state of Indiana by way of the 14th Amendment, because of the Indiana Trial Court's Summary Judgment grant based on its misinterpretation and misapplication of an Indiana Annexation Statute which is fundamentally unconstitutionally vague. Such application by the Indiana Courts is also contrary to the rights of the Indiana citizen as protected by *Article I, Sec. 12 of the Indiana Constitution* guaranteeing its citizens access to their court system As Justice J. Dickson affirmed: "The openness of Indiana courts is a foundational policy objective expressly recognized in *Article I, Section 12 of the Indiana Constitution.*" Pence v. State of Indiana, No. 49S00-9406-CV-579, Indiana Supreme Court, June 20, 1995 at Page 3.

The Petitioners assert that the language of the pertinent statute is so fundamentally vague on its face that it lends itself to a conflict in interpretation of what constitutes the statute's triggering "event" for the period of time to run. (R. 46). The Petitioners stated that the language in Section 4 of Ordinance Number 2, is similar to the language found in I.C. 36-4-3-11(2) except they found one critical difference: "The statute merely states

that remonstrance must be filed within 60 days after 'the publication' while, on the other hand, the Ordinance itself states that it shall be effective sixty (60) days after the ': **last publication**' ." (R. 46). (Emphasis added). The Petitioners further state that the "two are not the same, for while 'publication' is neutral as to the number of insertions, 'last publication' suggests that there will be more than one." (R. 46).

The Petitioners' argument is strongly supported by the wording of the Ordinance in and of itself. (R. 46). The pertinent part of the Ordinance's language in section 4 is as follows:

> "[T]he annexation of the described territory shall be effective sixty (60) days after the **last notice published** pursuant to I.C. 5-3-1."
> (R. 53).(Emphasis added).

The trial Court, Indiana Appellate Court and the Supreme Court of Indiana have failed collectively in their responsibilities to the citizen to review the meaning of language used in the statute and in their collective duty is to construe such language by giving effect to its plain ordinary meaning. *Bowen v. Review Board of Indiana Employment Security Division*, 362 N.E.2d 1178, 173 Ind. App. 166 (1977).

The Petitioners correctly demonstrated that the word "last" implies an expectation of more than one with their reference to Webster's New Collegiate Dictionary (9th ed. 1979). (R. 53). In addition, the Petitioners correctly contend that the pertinent Statutes themselves lend to more than one interpretation and therefore to unfair confusion. (R.46). Indiana Statutes I.C. 36-4-3-7 and I.C. 5-3-1-2 provide the requirements for publication of the Annexation Ordinance. (R. 46). In addition, the Petitioners assert that annexation ordinances are not listed specifically in I.C. 5-3-1-2. (R.46).

In order to determine when the time period for remonstration takes effect, the Petitioners indicate that they have to interpret what kind of "event" the annexation process is and which category, or subsection, the process belongs to. (R. 46). The Petitioners point out that paragraphs (a) through (g) refer to specific types of "events" which includes public hearings, sale of bonds or receipt of bids. (R. 46). The Petitioners assert that, therefore, it is only by "process of elimination" that they are left with two "catch-all" paragraphs of (h) and (i). (R. 46 - 47). As the Petitioners point out, each section states as follows: Paragraph (h) [i.e. I.C. 5-3-1-2(h)] states:

> "If the event is one about which notice is required to be published after the event, notice shall be published one (l) time within thirty days after the date of the event." (R. 47).

And I.C. 5-3-1-2(i) states:

> "If the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least three (3) days before the event." (R. 47).

The Petitioners then properly inquire as to which category an annexation ordinance best fits. (R.47). What makes this even more problematic is that the Petitioners found that the word "event" is not specifically defined anywhere within I.C. 5-3-1 et seq. (R. 47). Thus, construction of another term in the statute, the word "event", has to be interpreted with the likely result being, again, more than one interpretation.

This is why the Court was left with the obligation to render an interpretation of ambiguous and unclear statutory language for the sake of fair notice. *Bowen v. Review Board of Indiana Employment Security Division*, 362 N.E.2d 1178, 173 Ind. App. 166 (1977). In accordance with *Bowen*, the Court was called upon to construe the statute by giving effect to the plain ordinary meaning of the language used. The United States Supreme Court has likewise ruled that "words of a statute" must be given their common "ordinary meaning". *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 465, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968). *Banks* further imposed a responsibility upon the parties seeking to attribute anything other than an "ordinary meaning" to the statute to provide persuasive reasons for a "contrary" interpretation. *Id. See also Malat v. Riddell*, 383 U.S. 569, 571, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966).

The Petitioners assert that the meaning of "event" is the date on which the ordinance will take effect and become enforceable which cuts off the date for review. (R. 47). They correctly assert this as the best interpretation since they find that "event" is defined as "the consequence of anything; the issue or outcome of an action as finally determined; and that in which an action, operation, or series of operations, terminates." *citing* Black's Law Dictionary, (5th Ed 1979) and Webster's New Collegiate Dictionary (9th ed.1983) which states that an "event" is "the final outcome or determination of a legal action." (R. 47).

Instead, the Indiana Courts accepted the Town of Osceola interpretation that the "event" was the actual passage of the ordinance which the Town of Osceola contended fell within section (h) which required only one publication.(R.38 & 48).

The Petitioners contend that this interpretation is not only inconsistent with the "plain language" doctrine espoused by the *Bowen* court, it is also in direct conflict with *Southport Board of Zoning Appeals v. Southside Ready Mix Concrete,* 176 N.E.2d 112, 114, 242 Ind. 133 (1961), which declares an "event" as having a final effect of enforceability on the citizens only after it becomes law. *Southport Board* at 114.(Emphasis added). The Petitioners assert that the interpretation allowed by the Indiana Court is contrary to the policy upheld by *Southport Board* which is the purpose of a statute requiring publication of ordinances "is to inform the public of the effectiveness of the adopted ordinance." *Southport Board* at 114. The Petitioners subsequently contend that the

Southport Board interpretation is consistent with the language of I.C. 36-4-3-7(a) *et seq.* which ignores the date of passage and instead focuses exclusively on when and how ordinances **actually take effect**. (R. 48). (Emphasis added).

The conflict in interpretation of the number of required publications of an ordinance triggering the citizens' rights to file a timely remonstration petition against annexation within the Indiana ordinances and statutes, particularly I.C. 5-3-1-2 (h), is the basis of the fundamental issue of proper and fair notice required in assuring the citizens their due process rights. Since the language is so confusing, the predictable outcome was such a ruling as this against the citizens thus obstructing their constitutional due process rights and their constitutional right of access to their state Court. Here, the vigilant citizen did not receive have fair and sufficient notice in order to properly comply and therefore were denied their most fundamental constitutional property due process right to be heard on issues involving governmental intrusion on those property rights - especially when the question of greater taxation obligations attaches to those inherent property rights issues. This conduct is particularly contrary to the United States Supreme Court's protection of the citizen's consummate constitution right to his or her day in Court. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Indiana Courts have declared that statutes that lack the inherent fairness of providing the citizen with fair notice have been ruled "unconstitutionally vague". *See, e.g., National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management*, 571 N.E.2d 548, 555 (Ind.App. 4 Dist. 1991); *Citizens Gas and Coke Utility v. Wells*, 275 N.E.2d 323, 150 Ind.App.78 (Ind.App.1971) at 326. Yet, I.C. 5-3-1-2(h) proved to be so confusing and vague in its language and application it failed to provide the basic standards of fair and sufficient notice in order to avoid obstructing the Petitioners' access to I.C. 36-4-3-11(a) & (c) in order to satisfy their basic constitutional right to be heard on their fundamental property right issues. The consequence, as it stands now, is nothing less than a "manifest perversion of [their] constitutional [rights]" as found to exist in *Board of Com'rs of Howard County v. Kokomo City Plan Commission*, 310 N.E.2d 877, 892 (Ind.App. 2 Dist. 1974).

The United States Supreme Court upholds the citizen's fundamental right to due process protections based on constitutionally understandable statutes or regulations that give the citizen "fair notice of what conduct is required . . . . or [they are] unenforceable for indefiniteness." *Wisconsin Electric Power Co. v. Occupational Safety and Health Review Com'n*, 567 F.2d 735, 740 (C.A. 7 - 1977) *citing Buckley v. Valeo*, 424 U.S. 1, 77, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976). According to *Wisconsin*

Electric, if terms of a statute are "so vague that persons of common intelligence must guess at its meaning and differ as to its application violates the constitutional requirements of due process and cannot stand." *Wisconsin Electric* at 740. *See also United States v. Tandaric*, 152 F.2d 3 (7th Cir. 1945); *Cicero v. Olgiati*, 410 F.Supp. 1080, 1093 (S.D.N.Y. 1976); *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 683, 58 L.Ed.2d 596 (1979). The *Colautti* decision indicated that statutes that induce the kind of uncertainty that "threatens to inhibit the exercise of constitutionally protected rights" must be declared "void for vagueness." *Colautti* at 391, 99 S.Ct. at 683. *See also Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)(statute deemed vague when "men of common intelligence must necessarily guess at its meaning"); *Texas Eastern Products Pipeline Co. v. Occupational Safety and Health Review Com'n*, 827 F.2d 46, 51 (C.A. 7 1987) (strong dissenting opinion by Circuit Judge Manion). Federal Courts have consistently upheld the policies behind assuring clear and unambiguously drafted statutes which provide "explicit standards" in order to guarantee all of the citizen's constitutional protections. *See, e.g., Waldron v. McAtee*,

723 F.2d 1348, 1358 (C.A. 7 (Ind.) 1983). According to *Waldron*, "uncertain meanings will lead citizens to 'steer far wider of the unlawful zone than if the boundaries of the boundaries of the forbidden areas were clearly marked." *Id.* at 1358 *citing Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The United States Supreme Court has affirmed that "a law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions inasmuch as the fundamental defect is not the penalty but the exaction of obedience to a . . . standard so vague and indefinite as to be no . . . standard at all." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Such is the situation at present in this case.

Therefore, the compelling issues of denial of due process and fair notice warrant certiorari review. U.S.SUP.CT. R. 10(b).

CONCLUSION

WHEREFORE, for the above-stated reasons, the petition for writ of certiorari should be granted.

Dated: May 20, 1997

Respectfully submitted,

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APPENDIX

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APPENDIX A

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IN THE
COURT OF APPEALS OF INDIANA

JAMES KIRK, MARCIA KIRK, DONNA)
SUE GALL, PATTY HUMMER, ET AL.,)
)
Appellants-Plaintiffs,)
)
vs.) No. 71A03-9506-CV-203
)
THE TOWN OF OSCEOLA, INDIANA,)
)
Appellee-Defendant.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D07-9307-CP-10138

August 26, 1996

OPINION - FOR PUBLICATION

HOFFMAN, Judge

Appellants-plaintiffs, James Kirk, Marcia Kirk, Donna Sue Gall, and Patty Hummer et al.,[1] appeal the entry of summary judgment in favor of defendant-appellant Town of Osceola, Indiana. The facts relevant to review are recited below.

Essentially, the parties agree on the facts but differ as to the application of the law to the facts. On May 3, 1993, the Town of Osceola, Indiana passed an ordinance approving the annexation of real property situated adjacent to Osceola. Donna Reinholtz the Osceola Town Clerk contacted the Mishawaka Enterprise, a newspaper which publishes legal notices in the area, to request that the annexation ordinance be published once.

Vivian Wilson, a newspaper employee, consulted a guide-book for publication of legal notices which indicated that the annexation notice should be published twice. When an attempt to contact Reinholtz failed, Wilson contacted an employee of the Mishawaka Clerk's office who informed Wilson that the standard practice is to publish legal notices twice. Wilson scheduled the notice to appear twice: on May 6, 1993 and on May 13, 1993. Osceola was billed for two publications.

Remonstrance petitions contesting annexation ordinances must be filed within 60 days of the date of publication of the annexation ordinance. The remonstrators, who are landowners affected by the annexation, filed their complaint on July 8, 1993. The petition would be timely only if the 60-day period commenced on May 13, 1993.

---

[1] Counsel for appellants is directed to review Ind. Appellate Rule 8.2.

Osceola filed a motion for summary judgment contending that the remonstrators failed to timely file their petition, inasmuch as only one notice was required by the statute; thus, the time period commenced on May 6, 1993 and the May 13, 1993 notice was superfluous. The remonstrators responded by contending that the petition was timely filed or, in the alternative, that Osceola should be estopped from asserting the time limitation because the notice was published twice.

On February 21, 1995, the trial court granted Osceola summary judgment. This appeal ensued. Other facts appear below as necessary for consideration of the appeal.

The remonstrators raise several issues for review. The dispositive issue is whether the second notice was superfluous based upon the notice and the governing statute.

When reviewing an entry of summary judgment, this Court uses the same standard used by the trial court. Ramon v. Glenroy Const. Co., Inc., 609 N.E.2d 1123, 1127 (Ind. Ct. App. 1993) trans. denied. Summary judgment is appropriate only when the evidentiary matter designated by the parties shows that there is no genuine issue as the any material fact, and the moving party is entitled to judgment as a matter of law. Id.; Ind. Trial Rule 56(C). Even if it appears that the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences. Fidelity Financial Services v. Sims, 630 N.E.2d 572, 574 (Ind.Ct.App.1994). Where, as here, the material facts are not in dispute, the issue is the application of the law to the facts. See id.

The notice states: "[T]he appropriate portions of this Ordinance shall be published as soon as is practicable, and the annexation of the described territory shall be effective sixty (60) days after the last notice published pursuant to I.C. 5-3-1."

IND. CODE *S*5-3-1-2(h)(1990 Supp.) provides:

> If the event is one about which notice is required to be published after the event, notice shall be published one (1) time within thirty (30) days after the date of the event.

Remonstrators focus upon the portion of the notice stating that the annexation would become effective 60 days after the "last notice published." Osceola contends that the last notice was superfluous. Placed in context, the notice states that the effective date is 60 days after the "last notice published pursuant to I.C. 5-3-1." The statute requires the publishing of only one notice. That the newspaper staff determined from outside sources that publication twice would be appropriate does not alter the plain meaning of the governing statute or the instructions given by the Osceola executive.[2] The second notice was not effective, inasmuch as the first and only notice required triggered the 60-day period. The petition filed by the remonstrators was not timely.

The Judgment of the trial court is affirmed.

Affirmed.

GARRARD, J., and BAKER, J., concur.

---

2 That the taxpayers should not be required to pay for additional notices not required is evidenced by IND. CODE *S* 36-2-2-25 (1988 Ed.) stating: "Whenever publication of a notice, report, or statement of any kind is required and a county is liable for the cost of that publication, the executive may not make or pay for publication in more than one (1) newspaper unless publication in two (2) newspapers is required. A person who violates this section commits a Class C infraction."

APPENDIX B

STATE *of* **INDIANA** SEAL OF THE

STATE OF INDIANA
1816 217 STATE HOUSE
INDIANAPOLIS, IN 46204

H. John Okeson
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

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Cause Number
71A03-9506-CV-00203
Lower Court Number:
71D049311CP10727

KIRK, JAMES & MARCIA ETAL -V- TOWN OF OSCEOLA, INDIANA

You are hereby notified that the SUPREME COURT has on this day 2/20/97
APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR AA

WITNESS my name and the seal of said Court,

this 20TH day of FEBRUARY, 1997

/s/ H. John Okeson
H. JOHN OKESON
Clerk Supreme Court, Court of Appeals and Tax Court

cr-er49

Supreme Court, U.S.
FILED
SEP 12 1997
CLERK

NO. 97-277

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES KIRK AND MARSHA KIRK, DONNA SUE GALL, AND PATTY HUMMER, Together With the Remaining Property Owners Who are Signatories Hereto and Who are in the Caption of this Complaint, Petitioners.

v.

TOWN OF OSCEOLA, INDIANA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN L. ESLINGER
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24 pp

QUESTIONS PRESENT FOR REVIEW

Respondent would point out to this Court that Petitioners' question #2 presented for review does not raise a federal question. Respondent submits that this question is not properly presented to this Court and need not be addressed by it. Furthermore, Petitioners' questions #1 and #3 were not properly raised at the state court level and do not reflect the basis of the decision of the highest state court. Therefore, this Court's jurisdiction under 28 U.S.C. Section 1257 cannot attach to this case.

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Stern, Supreme Court Practice, 7th Edition, pg. 193 (1993) 12, 13

CONCEDED MATTERS

Pursuant to Supreme Court Rule 24.2, Respondent agrees with the following sections of the Petitioners' Petition for Writ of Certiorari and, therefore, does not include the same in its Brief in Opposition: Parties to the Preceding; Opinions Below; and Constitutional Statutory Provisions Involved.

However, with regard to the Petitioners' section labeled Constitutional Statutory Provisions Involved, Respondent would point out to this Court that the state and federal constitutional provisions set forth were not properly raised by the Petitioners at the state court level. Petitioner agrees that Respondents have raised constitutional questions under the Indiana and United States Constitutions but does not agree that those provisions apply to this case. It's analysis of this issue will be set forth in the first section of its Reasons Why Petition Should Be Denied.

JURISDICTION

Petitioner disagrees with Respondents' conclusion in their Jurisdiction section that this Court has jurisdiction to review this matter pursuant to 28 U.S.C. Section 1257(3)(a) for the following reasons: the federal question raised is not a substantial question; the federal questions were not properly raised by the Respondents in the state courts; and the state court's judgment rests on independent and adequate state grounds.

STATEMENT OF THE CASE

On May 3, 1993, Respondent, Town of Osceola, Indiana, passed an ordinance approving the annexation of certain real property situated adjacent to the town. Immediately after the passage of the ordinance, Respondent requested that the Mishawaka Enterprise, a newspaper which publishes legal notices in the relevant area, publish the ordinance once. However, the Mishawaka Enterprise believed that annexation ordinances were to be published twice and therefore published the ordinance on May 6, 1993, and on May 13, 1993. On July 8, 1993, Petitioners filed an action in the Superior Court of St. Joseph County, Indiana, remonstrating against the annexation. Indiana's statute on annexation required that the remonstrance petition had to be filed within 60 days of the "last publication." July 8 was within 60 days of May 13, but was not within 60 days of May 6.

On December 21, 1993, Respondent moved for Summary Judgment in its favor on the grounds that Petitioners' Complaint was not timely because the same was filed more than 60 days after the only required publication. Petitioners argued that their Complaint was timely, and alternatively that Respondent should be estopped from asserting the limitations period as a defense. On February 21, 1995, the Honorable William T. Means for the St. Joseph Superior Court granted Respondents' Motion for Summary Judgment finding that the legal publication notice statute required only one publication, that the second publication was surplusage, and that Petitioners' Complaint was not timely.

On March 22, 1995, Petitioners filed their appeal to the Indiana Court of Appeals. On August 26, 1996, the Court of Appeals affirmed the trial court's award of Summary Judgment in favor of Petitioner and stated that the only relevant inquiry was whether the notice statute required one or two publications. The Indiana Courtof Appeals held that only one publication was required and that

Petitioners' Complaint was not timely.

On September 25, 1996, Petitioners petitioned the Indiana Supreme Court to transfer this matter for reviewof the decision of the Court of Appeals of Indiana. On February 20, 1997, the Indiana Supreme Court denied Petitioners' Petition for Transfer withouta written opinion.

The Petitioners did not raise any constitutional or other federal issues at the trial court level. They also failed to fulfill their obligations under Supreme Court Rule 14(g)(i) to set forth when the federal question was raised in the trial court. This omission in their Petition is due to the fact that the federal questions alleged on appeal and presented to this Court were never properly raised at the trial court level in accordance with both Indiana law and federal law.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS FAILED TO PROPERLY RAISE FEDERAL QUESTIONS IN STATE COURT.

28 U.S.C. § 1257 requires that a substantial federal question be properly raised in the state court proceedings in order for this Court to have jurisdiction. If the state court does no more than discuss the interpretation of the state statute, without considering such interpretation in the light of a federal question properly presented to it, this Court cannot consider the federal issues. Beck v. Washington, 369 U.S. 541, 549-550 (1962). The case before this Court solely involves the statutory interpretation of a state statute by the Indiana Court of Appeals. This case does not involve constitutional issues that require this Court's time and interpretation. Petitioners improperly attempted to raise federal questions at the state appellate level after they lost at the trial court level. The Indiana Court of Appeals and the Indiana Supreme Court neither addressed these federal questions nor relied on federal law in interpreting the state statutes involved.

Respondent, Town of Osceola, Indiana, respectively requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Indiana Court of Appeals and Indiana Supreme Court's denial of transfer without opinion because Petitioners failed to properly raise their federal questions at the state court level. Petitioners cannot challenge the constitutionality of the legal notice and annexation statutes because they did not raise these challenges at the trial court level. The Indiana Court of Appeals and the Indiana Supreme Court, therefore, properly refused to address the Petitioners' constitutional challenges that were raised for the first time on appeal. This Court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was

due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Bailey v. Anderson, 326 U.S.203, 206-207 (1945). In Beck v. Washington, 369 U.S. 541,550 (1962), this Court recognized the reasonableness of a state supreme court's refusal "to consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute." Thus, if reasonable state procedural requirements are not followed, this Court should decline to exercise jurisdiction where the highest state court is completely silent on any federal question. Mutual Life Ins.Co. v McGrew, 188 U.S. 291, 309 (1903).

A party must follow the state procedures in raising a federal question, and any failure to follow such procedures should cause this Court to deny review. Ferguson v. Georgia, 365 U.S. 570, 572 (1961). Indiana courts have long disfavored litigants raising issues for the first time on appeal. Cheek v. State, 567 N.E. 2d 1192, 1195 (Ind. App. 1991). Issues not raised in the trial court are considered waived on appeal. Clarkson v. Dept. of Ins. of State of Indiana, 425 N.E. 2d 203 (Ind. App. 1981). Constitutional challenges to statutes are subject to this rule as well. Kern v. Wolf, 622 N.E. 2d 201, 203 (Ind. App. 1993); Fort Wayne Patrolman's Benev. Ass'n. Inc. v. City of Fort Wayne, 408 N.E. 2d 1295 (Ind. App. 1980). Therefore, constitutional challenges to state statutes cannot be raised for the first time on appeal. Kern, supra at 203.

In Chidester v. Hobart, 631 N.E. 2d 908 (Ind. 1994), remonstrators to an annexation did not raise any constitutional challenges to the statutes involved at the trial court level or in the Court of Appeals. Rather, they raised due process challenges for the first time in the Indiana Supreme Court. The Court held that the remonstrators' failure to raise these objections in the trial court precluded them from being raised on appeal. In so doing, the Court stated the following:

> Counsel for the remonstrators now wish to raise various constitutional objections to the annexation.*** Counsel for the remonstrators, however, have waived each of these claims. Counsel may not raise these issues for the first time on appeal ... much less for the first time on a subsequent appeal after a limited remand. Id. at 912, 913.

Petitioners in this case did not raise any constitutional objections to the statutes at issue in the trial court. Rather, they raise these challenges for the first time in their appeal to the Indiana Court of Appeals. Therefore, they have waived any constitutional arguments and Respondent respectfully submits that this Court cannot consider Petitioners' challenges to the constitutionality of the statutes at issue in this matter.

Also, Petitioners' Petition for Writ of Certiorari is not in compliance with Supreme Court Rule 14.1(g)(i). This rule states in pertinent part as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal question is sought to be reviewed or raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears ...., so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. ....

The petitioners cannot comply with this rule and show this Court that any federal questions were timely and properly raised because the federal questions presented were not raised by Petitioners until they appealed the trial court decision to the Indiana Court of Appeals. This method of raising constitutional questions is improper. Consequently, the Indiana Court of Appeals and Indiana Supreme Court did not address those issues. In other words, no state court has decided an important federal question in this case pursuant to Supreme Court Rule 10. Likewise, this Court should not address the constitutional questions raised by Petitioners because they were improperly presented in the state courts. See Parker v. Illinois, 333 U.S. 571 (1948).

This Court has stated numerous reasons for refraining from deciding federal questions not properly presented or decided at the state court level. In Illinois v. Gates, 462 U.S. 213, 218-219 (1983), this Court quoted from McGoldrick v. Comthenie Generale Transatlantique, 309 U.S. 430, 434-435 (1940), the following:

> "... in cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state of this judicial action were are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in state court, consistently refuses to consider any

> grounds of attack not raised or decided in that Court."

In Cardinale v. Louisiana, 394 U.S. 437, 439 (1969), this Court stated the following:

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, sincethe statutes may be construed in a way which saved their constitutionality. Or the issue may be blocked by an adequate state ground.

Therefore, because there is not substantial federal questions before this Court, it should deny the Petitioners' Petition for Writ of Certiorari.

II. INDEPENDENT AND ADEQUATE STATE GROUNDS EXIST TO SUPPORT THE DECISIONS OF THE INDIANA COURT OF APPEALS AND INDIANA SUPREME COURT, THEREBY PRECLUDING JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.

Even if this Court finds that Petitioners properly raised their constitutional questions at the state court level, under 28 U.S.C. § 1257, it is a well settled rule that this Court does not have jurisdiction to decide a case if the decision below rests on independent and adequate state ground. Michigan v. Long, 463 U.S. 1032, 1037 (1983). In Michigan v. Long, this Court established the following

standard in which to determine whether an independent and adequate state ground exists to support the decision by the highest state court:

> ....when ... a state court decision fairly appears to rely primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so. If a state court chooses merely to rely on federal precedents as precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If this state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-1041. The standard set forth in Michigan v. Long has been upheld and is the standard used today. See Arizona v. Evans, 514 U.S.1 (1995). In Michigan v. Long, this Court found that the Michigan Supreme Court rested its decision primarily on federal law. Id. at 1044. This Court reasoned that although there were references to the state constitution, it otherwise relied exclusively on federal law. Id. at 1037.

Unlike the reliance on federal law in Michigan v. Long, the Indiana Court of Appeals in this case relied purely on state statutory interpretation in deciding this case. Since the Indiana Supreme Court

denied the Petitioners' petition for transfer without opinion, the decision to be examined is the Indiana Court of Appeals ruling in Kirk v. Town of Osceola, 669 N.E. 2d 1060 (Ind. App. 1996). See Ylst v. Nunnemaker, 501 U.S. 797 (1991). The Indiana Court of Appeals made absolutely no reference to federal law when it decided this case. It merely reviewed the trial court's ruling of Summary Judgment in favor of the Respondents in this case and affirmed the statutory interpretation of the state statutes involved. It is abundantly clear the lower court's holding was based on independent and adequate state grounds. Therefore, this Court should not undertake to review the lower court's decision.

A case almost directly on point ~~is~~ Coleman v. Thompson, 501 U.S. 772 (1991). Although a criminal case, it involved the issue of whether state procedural grounds were both independent and adequate to support the lower court's decision. The standard set forth in Michigan v. Long, supra, a direct review case, was also applied in Coleman v. Thompson, a federal habeas case. Coleman v. Thompson, 501 U.S. at 734-736. In Coleman v. Thompson, a jury convicted Coleman of rape and capital murder and sentenced him to death for the murder. The trial court imposed the death sentence and the Virginia Supreme Court affirmed both convictions and the sentence. Coleman then filed a petition for a Writ of Habeas Corpus in Circuit Court, and the Circuit Court ruled against him on all claims. The Court entered its final judgment on September 4, 1986. Coleman then filed a Notice of Appeal with the Circuit Court on October 7, 1986, 33 days after the final judgment. The Commonwealth of Virginia filed a Motion to Dismiss arguing that he had not timely filed his Notice of Appeal. Virginia Supreme Court Rule 5:9(a) provided that no appeal would be allowed unless a Notice of Appeal has been filed with the trial court within 30 days of the final judgment. Coleman next filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Virginia. The District Court concluded that he had procedurally defaulted, and the United States Court of Appeals for the Fourth

Circuit affirmed. The Fourth Circuit held that the Virginia Supreme Court's decision rested on independent and adequate state grounds. Id. at 728-729. This Court affirmed the holding of the Court of Appeals for the Fourth Circuit. Id. at 729.

This Court reiterated the rule that it would " ... not review a question of federal law decided by the state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Id. (Citations Omitted). "This rule applies whether the state law ground is substantive or procedural." Id. (Citations Omitted). This Court stated that a habeas petitioner who fails to meet a state's procedural requirements for presenting federal claims has deprived the state courts of an opportunity to address those claims. Id. at 732. In Coleman v. Thompson, this Court did not apply the presumption set forth in Michigan v. Long, supra, and Harris v. Reed, 489 U.S. 255 (1989), because it did not "fairly appear" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with federal law. Coleman v. Thompson, supra at 740. The Virginia Supreme Court opinion was based solely on Coleman's failure to meet the applicable state time requirements, and there was no mention of federal law in its opinion. Id. This Court stated that the dismissal was based solely on procedural grounds, independent of federal law. Id. at 744. In summary, the doctrine of adequate and independent state grounds requires that a federal court will not review a state court decision that rests on a state law ground, either substantive or procedural, that is independent of federal law and is adequate to sustain the decision. Fox Film Corp. v. Muller, 296 U.S. 207,210 (1935).

Like Coleman, Petitioners in this case lost because they did not follow the time requirements set forth in the applicable state statutes. The trial court's granting of Summary Judgment for Respondent in this case and the Indiana Court of Appeals affirmance of the trial court's decision was based purely on the interpretation of

the time limits set forth in the Indiana statutes. The Indiana Court of Appeals did not address any of the Petitioners' improperly raised federal questions and based its decision solely on state law and state statutes. Therefore, this Court does not have jurisdiction to review this case under 28 U.S.C. § 1257 and should deny the Petitioners' Petition for Writ of Certiorari.

Further, in Harris v. Reed, 489 U.S. 255, 263 (1989), this Court reiterated the rule that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Id. 263 (Citations Omitted). This Court concluded that the state court did not "clearly and expressly" rely on state procedural grounds for rejecting the Petitioners' ineffective-assistance-of-counsel claim because the state court addressed the Petitioners' federal chim on the merits, thereby, creating ambiguity by referring tostate law and at the same time relying on federal law. Id. at 266, n. 13. Unlike the state court in Harris v. Reed, no Indiana state court has addressed any of the petitioners' untimely federal questions. No Indiana state court has relied on federal law or interwoven federal law with Indiana state law. The Indiana Court of Appeals "clearly and expressly" held that its judgment rested on a state procedural bar. Independent and adequate state grounds exist to support the lower state courts' decisions. Therefore, this Court does not have jurisdiction to review this case under 28 U.S.C. Section 1257 and should deny the Petitioners' Petition for Writ of Certiorari.

III. THE STATE COURT'S INTERPRETATION OF STATE LAW AND ITS HOLDING ON THE MERITS OF THIS CASE ARE CORRECT.

Notwithstanding the independent and adequate state grounds of the state court's decision, the fact remains that Petitioners

improperly raised their federal questionsat the state court level, and, therefore, did not preserve them for this Court to review. As a result, Petitioners are essentially asking this Court to spend its time reviewing and interpreting state statutes. The Petitioners make this request because they believe the Indiana courts have committed errors in their interpretation of the applicable statutes in this case. However, correcting alleged interpretational errors of state statutes from lower state court decisions should not be the task of this Court. Stern, Supreme Court Practice, 7th Edition, pg. 193 (1993). This Court's workload and responsibility are too great to require it to review and correct every error by lower courts. Id. Nevertheless, the Respondent will address the Petitioners' allegations of error by the state courts and support the correctness of the state court's holding on the merits of this case.

Petitioners make three basic arguments in their section titled Reasons for Granting the Petition. First, Petitioners set forth an extended argument of what they perceive as the plain and ordinary meaning of the statutes involved. Although this argument goes to the merits of the Indiana Court of Appeals decision and is beyond the scope of what should be included in the Petition for Writ of Certiorari, Respondents feel compelled to address this argument.

Indiana has codified the requirements for publishing legal notices in Ind. Code 5-3-1, et seq. Like most legal notice publications, municipal annexation ordinances are published in the manner prescribed by Ind Code 5-3-1. Ind. Code 36-4-3-7(a). Ind. Code 5-3-1-2 sets forth the number of publications require for various notices and applies "when notice of an event is required to be given by publication in accordance with Ind. Code 5-3-1." The statute, at the time of the annexation ordinance at issue was published, read as follows:

> (h) if the event is one about which notice is required to be published after the event, notice shall

be published one time within 30 days after the date of the event.

(i) if the event is anything else, notice shall be published two times, at least one week apart, with the second publication made at least three days before the event.

Ind. Code 5-3-1-2(h)(i).

Courts must interpret a statute in the context of the whole act in such a manner as provides a harmonious result. Thompson v. Fernand Sesquicentennial Committee, Inc., 637 N.E. 2d 178 (Ind. App. 1994). When, as here, the statute to be construed is linked to another statute, the two statutes must be considered in a pari materia to create harmonious result. Clark v. Kenley, 646 N.E. 2d 76 (Ind. App. 1995).

Petitioners contend that the "event" referred to in this statute is the effectiveness of the annexation. This interpretation of the statute provides an absurd result. According to Indiana law, residents have 60 days to remonstrate from the date of publication. Ind. Code 36-4-3-11(a). If the event is the effectiveness of the annexation, the event is one which requires notice to be published before it takes place. Notice would then be published twice with the last notice to occur at least three days before the date the ordinance takes effect. Ind. Code 5-3-1-2(i).

According to Petitioners' construction of the statute, the remonstrators could conceivable file their petition up to 57 days after the annexation ordinance takes effect. The purpose of the remonstrance statute is to give residents an opportunity to object to annexation before it actually occurs. City of Hobart v. Chidester, 596 N.E. 2d 1374, 1377 (Ind. App. 1992). Thus, a construction of the statute which allows residence to abate the effectiveness of

annexation after it has already occurred is absurd.

The trial court properly construed the word "event" in the notice statute, as applied to annexation ordinances, to mean the date on which the annexation ordinance is passed. By construing the word "event" to mean the date of the passage of the ordinance, the event becomes one which requires publication only once after the date of passage. This interpretation allows residents a full 60 days from the date of the publication to file a remonstrance petition before the ordinance becomes effective. Only this interpretation harmoniously construes the annexation statute with the legal notice statute.

The Indiana Court of Appeals agreed with the trial court and found that only one notice was required. This interpretation is consistent with prior Indiana cases. See Deaton v. City of Greenwood, 582 N.E. 2d 82 (Ind. App. 1991). Therefore, the courts have given the statutes involved the only plain and ordinary meaning that is reasonable.

Second, the Petitioners argue that they were denied due process and fair notice. They state that the statutes involved in this case were so fundamentally vague as to deny them due process with regard to a property right. Petitioners argue thatthey were somehow deprived of a protected property interest by the annexation without having the opportunity to be heard prior to the alleged deprivation and that this deprivation without hearing was caused by inadequate procedural safeguards under Ind. Code 5-3-1-2, which is part of Indiana's annexation act. However, Petitioners cannot prevail on this argument because no protected property interest was deprived due to the annexation. This case involves the annexation of Petitioners' property, and annexation of property is not a taking of property nor does it deprive any person of his/her property. Chidester v. City of Hobart, 631 N.E. 2d 908, 913 (Ind. 1994). Furthermore, Petitioners were provided with notice of the annexation and the opportunity to

file an action to contest the same. Therefore, Petitioners were not deprived of any property right or denied due process of law.

A person's right to due process of law emanates from the United States Constitution and the Indiana Constitution. According to the former, "no State shall deprive any person of life, liberty, or property without due process of law ...." U.S. Constitution Amendment XIV Section 1. According to the latter, "every person, for injury done to him and his person, property, or reputation, shall have remedy by due course of law." Indiana Constitution Article I, Section 12. "The essence of a due process violation is the deprivation of a protected 'liberty' or 'property' interest without adequate procedural safeguards." Boxton v. Lovell, 559 F.Supp. 979, 991 (S.D.Ind. 1983). Thus, to state a viable due process claim, a party must generally demonstrate that it had a protectable property interest of which it was deprived without notice and an opportunity for a hearing. Inner City Leasing & Trucking v. City of Gary, 759 F.Supp.461 (N.D.Ind. 1990). Since Petitioners were not deprived of a protected property interest by the annexation, a procedural due process claim cannot stand, regardless of the process provided. See Swartz v. Scruton, 964 F 2d 607 (7th Cir. 1992).

Further, Petitioners were provided due process of law. Procedural due process only requires that remonstrators be given notice and an opportunity to be heard. Yoder v. Elkhart County Auditor, 632 N.E. 2d 369 (Ind. App. 1994). Such notice was given pursuant to Ind. Code 5-3-1-2 which requires that annexation ordinances be published once to indicated the effective date of the annexation. Ind. Code 36-4-3-11 affords Petitioners the ability to file an action for remonstrance within 60 days of the date of the publication, thereby entitling them to be heard. Therefore, even if petitioners were able to show a deprivation of a protectable property interest, they were provided notice and an opportunity to have their objections heard and were thereby provided due process of law.

Third, Petitioners argue that Ind. Code 5-3-1-2 is unconstitutionally vague. They reach this conclusion because this statute was subject to two different interpretations,that of Petitioners and that of the Indiana courts.

However, all statutes are clothed with a presumption of constitutionality. Commissioner of Labor v. Gary Steel Products, Corp., 643 N.E. 2d 407 (Ind. App. 1990). According to the Supreme Court of Indiana:

> "We begin our review by noting that every statute stands before this Court cloaked the presumption of constitutionality ... It is our duty to bring it into harmony with constitutional requirements, if the language permits. If it is capable of any constitutional interpretation, it must be upheld."

Matter of Public Law No. 154-1990, 561 N.E. 2d 791,792 (Ind. 1990) (Citations Omitted).

Under basic principles of due process law a statute is unconstitutionally vague only if individuals of ordinary intelligence must guess at its meaning and differ as to its application. Garrod v. Garrod, 590 N.E. 2d 163 (Ind. App. 1992). Petitioners contend that the Indiana statute requires ordinances to be published twice. The Indiana courts found that the statute requires publication only once. Petitioners' construction of the statute leads to an absurd result that a remonstrance petition could be filed after the effective date of the ordinance; a result clearly not intended by the legislature and not in harmony with the annexation act. The Indiana courts' interpretation leads to a reasonable result in harmony with the intent in which it was written. Where a statute is susceptible to more than one interpretation, but only one interpretation is reasonable, the statute is not unconstitutionally vague. Neudecker v. Neudecker, 566 N.E. 2nd

557, 562 (Ind. App. 1991) ("If the statute can be made constitutionally definite by reasonable construction, the court's duty is to give the statute that construction."). Therefore, Ind. Code 5-3-1-2 is not unconstitutionally vague simply because the Petitioners construed it in an unreasonable manner.

In conclusion, Petitioners arguments on the merits of this case are incorrect, and the state courts' interpretation and application of state statutes are correct and internally consistent.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests this Court to deny the Petitioners' Petition for Writ of Certiorari.

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